COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH

SUFFOLK, ss. NO. SJC- 11693

COMMONWEALTH

v.

NYASANI WATT (AND NINE COMPANION CASES[1])

MOTION OF FOUR DISTRICT ATTORNEYS TO VACATE THE REMAND WITHOUT PREJUDICE OR, IN THE ALTERANTIVE, TO INTERVENE

The District Attorneys for the Cape and Islands, Essex, Norfolk, and Plymouth Districts ["Four District Attorneys"], respectfully move 1) to vacate the remand without prejudice to action by the legislature or seeking relief through a declaratory judgment action; or, alternatively, 2) to permit the Four District Attorneys to intervene and to participate, through their designee, in the evidentiary hearing ordered by this Court upon remand in the above-captioned case. As grounds, the remand in question commands creation of a scientific factual record concerning putative advances in scientific knowledge about brain development in the six years since Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013) (Diatchenko I), S.C., 471 Mass. 12, (2015)(holding that Art. 26 forbids life without parole sentences those convicted first-degree murder committed seventeen). Commonwealth v. Watt, 484 Mass. 742, 2020 WL 2977352, *8-9 (2020). This Court has stated it will use this record to re-examine the constitutionality of the mandatory life-without-parole sentences for first-degree murderers, G.L. c. 265, §§ 1, 2, who were "young adults" -- ostensibly, between the ages of eighteen and twenty-two -- when they committed their offenses. Id. This has a clear potential to affect cases well beyond Suffolk County. Indeed, the factual record created in this single case may form the basis

[1] Four against Nyasani Watt and five against Sheldon Mattis.

on which this Court may invalidate countless sentences for murder and other serious felonies across the Commonwealth and control the law in this area for the foreseeable future.

In the wake of Miller v. Alabama, 567 U.S. 460, 465, 470 (2012) and Diatchenko I -- balancing both the juvenile brain science that animates those decisions *and* the broader weighty, societal interests at stake in setting sentences for the gravest crimes -- the legislature drew the line at which persons should receive adult sentences for first degree murder at age eighteen. For those younger, it established a staircased set of parole eligibility dates based on the theory of conviction.[2] The question whether, in the mere six years since Diatchenko I, the relevant science has so advanced, and also become sufficiently settled, that the principles of Miller and Diatchenko I must now be extended to those heretofore considered legal adults, is an exercise in fine line drawing uniquely suited to the legislature, whose constitutional prerogative is to define crimes and set sentences. Legislative action would permit the creation of the extensive scientific record required to address such a question, and also permit the multiple stakeholders, including the victim community, to contribute and be heard. Alternatively, though less ideally, the defendant may challenge the current sentencing scheme by way of a declaratory judgment action, which could also permit participation of the broader community affected. For these reasons, vacatur of the remand is appropriate.

In the event the Court declines to vacate its remand order, in these unusual circumstances, it should permit intervention by the Four District Attorneys. Creation of this critical factual record should not be left to the prerogatives of the individual parties and judge on remand in this

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[2] In 2013, a year after Miller, the Legislature enacted "An Act Expanding Juvenile Jurisdiction," which "amended the upper limit of the operative ages in the definitions of a 'delinquent child' and 'youthful offender' under G.L. c. 119, § 52 from seventeen years of age to eighteen." Watts v. Commonwealth, 468 Mass. 49, 50-51 (2014), citing St. 2013, c. 84, §§ 25, 26. It left in place the exclusion from parole eligibility of "juvenile" first degree murderers -- now, those between 14 and 18 at the time of commission. St.2013, c. 84, § 26. In 2014, following Diatchenko I, it enacted **"**An Act Relative to Juvenile Life Sentences for First Degree Murder," G.L. c. 279, § 24 as amended through St. 2014 c. 189, § 6, which amended first-degree murder sentencing for juveniles to provide for parole eligibility after not less than 30 years for extreme atrocity or cruelty, not less than 25 years for deliberate premeditation, and not less than 20 years for felony murder.

case. As elected officials and the chief law enforcement agents in their respective districts, see In re Subpoena Duces Tecum, 445 Mass. 685, 687 n.5 (2006), with numerous cases that will be affected, the Four District Attorneys have direct and substantial interests that are not adequately represented by the current parties to this litigation, or by resort to the filing of amicus briefs. Accordingly, they seek a voice in the ordered evidentiary hearing and, if necessary, to adduce evidence and cross-examine witnesses.[3] Though intervention is generally foreign to criminal cases, in these unusual circumstances, where the Four District Attorneys lack adequate alternative means to vindicate their interests, intervention should be permitted pursuant to this Court's superintendence powers under G.L. c. 211,§ 3, or its inherent powers, in the interests of justice and fairness. Commonwealth v. Fontanez, 482 Mass. 22, 25–26, (2019)(superintendence powers properly invoked by Commonwealth in case presenting "a systemic issue that will have an effect not just on the current case but on numerous other cases"); Cf. Bridgeman v. District Attorney for Suffolk Dist., 471 Mass. 465, 482-485 (2015)(permitting Committee for Public Counsel Services ["CPCS"] to intervene in superintendence petition concerning Hinton lab).

The remand

In the six years since Diatchenko I, this Court has repeatedly declined to extend its holding to individuals eighteen years and older. In Commonwealth v. Chukwuezi, 475 Mass. 597 (2016), the Court pointedly observed, "The age of eighteen 'is the point where society draws the line for many purposes between childhood and adulthood.' That such line drawing may be 'subject to the objections always raised against categorical rules' does not itself make the defendant's sentence unconstitutional." Id. at 610, citation omitted. See also Commonwealth v. Colton, 477 Mass. 1, 18-19 (2017)(principle that juveniles are constitutionally different for purposes of sentencing "is inapplicable to the defendant, who was twenty-one years

[3] Intervention would of course be limited to assistance in the creation of the factual record and to make arguments concerning its legal import. The Seven District Attorneys would not purport to represent the Commonwealth with respect to the individual cases at issue in this litigation, which of course is controlled by the Suffolk District Attorney's Office.

old at the time of the offense"); Commonwealth v. Garcia, 482 Mass. 408, 413 (2019)(noting that "minimal record on brain development in this case consisting of one expert's testimony presented during trial rather than at sentencing, does not allow us to reach an informed conclusion on . . . individuals in their late teens or early twenties"). See also Commonwealth v. Lugo, 482 Mass. 94, 100 (2019) (rejecting claim that juvenile second-degree murderers are entitled to an individualized hearing; "We are unpersuaded that the law and science are firmly established to warrant further consideration at this time."). At the same time, however, the Court has also noted that "researchers continue to study the age range at which most individuals reach adult neurobiological maturity, with evidence that ... [certain] brain functions are not likely to be fully matured until around age twenty-two," and that such "research may relate to the constitutionality of sentences of life without parole for individuals other than juveniles." Garcia, 482 Mass. at 412-413; see also Commonwealth v. Okoro, 471 Mass. 51, 60 n. 14 (2015).

On June 4, 2020, this Court decided Commonwealth v. Watt, 484 Mass. 742, 2020 WL 2977352, *8-9 (2020), which affirmed the convictions of both Watt and Mattis of first-degree murder on theories of deliberate premeditation and extreme atrocity or cruelty. Under the sentencing scheme in effect in 2013,[4] Watt, seventeen at the time of the offense, was sentenced to life with the possibility of parole in fifteen years while Mattis, eighteen at the time of the offense, received a mandatory sentence of life without the possibility of parole under G. L. c. 265, § 2. On appeal, Mattis "point[ed] to research that shows that the same developmental traits that exist for those under the age of eighteen apply to those between eighteen and twenty-two years old," and argued for expansion of Diatchenko I to that age cohort. Id. at *8. Alternatively, he contended that Art. 26 mandated an individualized hearing for such defendants "in which a judge is able to determine an appropriate sentence based on his particularized circumstances." Id. at *8 & n. 14.

[4] In 2013, prior to "An Act Relative to Juvenile Life Sentences for First Degree Murder," the sentencing statute, as limited by Diatchenko I, mandated a sentence of life with the possibility of parole after fifteen years. Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 673 (2013) (Diatchenko I), S.C., 471 Mass. 12 (2015).

In its brief, the Suffolk District Attorney's Office stated that this was a question for the legislature:

> While the District Attorney supports legislation that contemplates the expansion of the statutory sentencing scheme for juveniles convicted of murder to include emerging adults, the legislative process would ensure that all relevant stakeholders, including the District Attorney, have the opportunity to weigh in on this important change.

Brief of Suffolk District Attorney at p. 86. It further stated in a footnote that

> This case presents a compelling example of the need for legislative change . . . The District Attorney does not believe that such disparate sentences for emerging adults convicted of identical crimes serve the interests of justice.

Brief of Suffolk District Attorney at p. 86 & n. 44. The Court noted that the current record "is insufficient" to determine the questions of whether expansion of Diatchenko I was constitutionally mandated, or "whether individuals older than eighteen years of age are entitled to an individualized sentencing hearing." Watt at *8 & n. 14. It remanded:

> As research in this area has progressed since Diatchenko I was decided, it likely is time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it. We can only do so, however, on an updated record reflecting the latest advances in scientific research on adolescent brain development and its impact on behavior . . .We therefore take this opportunity to remand this case to the Superior Court for development of the record with regard to research on brain development after the age of seventeen. This will allow us to come to an informed decision as to the constitutionality of sentencing young adults to life without the possibility of parole.

Id. at *9.

ARGUMENT

I. The remand should be vacated where the question is one for the legislature, or, alternatively, relief should be pursued through declaratory judgment.

As this Court observed in Diatchenko I, because "[t]he severity of this particular crime cannot be minimized even if committed by a juvenile offender," id. at 674, "[i]t is plainly within the purview of the Legislature to treat juveniles who commit murder in the first degree more harshly than juveniles who commit other types of crimes, including murder in the second

degree." Id. at 672. The Supreme Court has likewise recognized the distinction between murder and other offenses in the context of juvenile offenders:

> The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. There is a line 'between homicide and other serious violent offenses against the individual.' Serious nonhomicide crimes 'may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.' This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense.

Graham v. Florida, 560 U.S. 48, 69-71 (2010) (citations omitted).

In 2014, taking into account new scientific understanding of brain development and while also balancing the other substantial interests at stake, the legislature drew the line between adult and juvenile murderers at age eighteen. The contemplated erasure and re-drawing of that line a mere six years later would trespass on territory entrusted to the legislature under Art. 30. "The [l]egislature has great latitude in defining criminal conduct and in prescribing penalties to vindicate the legitimate interests of society." Commonwealth v. Clint C., 430 Mass. 219, 222 (1999), quoting Commonwealth v. Pyles, 423 Mass. 717 , 720 (1996), and cases cited. "The function of the legislature [in this area] is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety." Id., quoting Weems v. United States, 217 U.S. 349, 379 (1910). And as argued by the Suffolk District Attorney's Office, "the legislative process would ensure that all relevant stakeholders . . . have the opportunity to weigh in on this important change." Brief of Suffolk District Attorney at p. 86.

Moreover, "[i]n a time when social science is rapidly evolving, the Legislature is in a better position than a court to act on advances in social science research . . . Courts are tasked with resolving particular disputes among parties and must limit rulings to those narrow issues, whereas the Legislature can more readily address most ills." Commonwealth v. J.A., 478 Mass.

385, 391 n.2 (2017) (Cypher, J., concurring), citing Deputy Chief Counsel for the Pub. Defender Div. of the Comm. for Pub. Counsel Servs. v. Acting First Justice of the Lowell Div. of the Dist. Court Dep't, 477 Mass. 178 , 187 (2017) (noting that while research may support change to statute at issue, it is nonetheless court's responsibility to enforce statutes as written by Legislature); Guzman v. MRM/Elgin, 409 Mass. 563 , 570 (1991) ("These are issues of broad public policy involving balancing the interests of future plaintiffs and defendants, which the Legislature is better equipped to resolve"). Alternatively, though less ideal than legislative action, a declaratory judgment action is a valid means by which to challenge the constitutionality of a statute. G.L. c. 231A, § 1 et. seq. See District Attorney for Suffolk Dist. v. Watson, 381 Mass. 648 (1980)(District Attorney filed complaint seeking declaratory judgment regarding constitutionality of capital punishment statute). This would also allow the participation of "parties who have or claim any interest which would be affected by the declaration" G.L. c. 231A, § 8.

Of course, vacating the ordered remand would not preclude the Suffolk District Attorney's Office, if it deems a particular sentence unjust, from agreeing to the grant of a new trial and accepting a plea to a lesser offense in this or any other case in its jurisdiction. Also, it would not preclude Mattis (or Watt) from pursuing a new trial motion and adducing evidence that their particular characteristics, in view of the latest findings about brain development, may have been a significant factor in the jury's assessment of their mental states at the time of the crime in the guilt phase of the trial, and therefore post-conviction relief is warranted. Commonwealth v. Epps, 474 Mass. 743, 767 (2016) ("our touchstone must be to do justice," including where "a defendant was deprived of a substantial defense ... [due to] the inability to make use of relevant new research findings"). The interests of the Four District Attorneys lay not in these individual defendants but in the potential broad systemic impact of the remand.

II. Alternatively, the Court should permit intervention

While intervention is "a concept foreign to criminal procedure" Republican Co. v. Appeals Court, 442 Mass. 218, 227 n.14 (2004), this Court's superintendence powers under

G.L. c. 211, § 3[5] are properly invoked where the Commonwealth lacks alternative means of relief and the case presents "a systemic issue that will have an effect not just on the current case but on numerous other cases" Commonwealth v. Fontanez, 482 Mass. 22, 25–26, (2019). Apart from this statutory power, courts have, and "must exercise their inherent authority 'as necessary to secure the full and effective administration of justice.'" Commonwealth v. Charles, 466 Mass. 63, 72–73 (2013), quoting O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 514 (1972). See Commonwealth v. Boe, 456 Mass. 337, 345 n. 13, (2010), quoting Brach v. Chief Justice of the Dist. Court Dep't, 386 Mass. 528, 536 (1982)("The very concept of inherent power 'carries with it the implication that its use is for occasions not provided for by established methods.'"). In the event the Court declines to vacate the remand order, the Court should grant intervention pursuant to these powers.

This Court's analysis of the CPCS's motion to intervene in Bridgeman v. District Attorney for Suffolk Dist., 471 Mass. 465, 481-486 (2015) under Mass. R. Civ. P. 24 is instructive. There, CPCS sought to intervene in a superintendence petition filed by individual defendants and reported to the Full Bench concerning the misconduct of chemist Annie Dookhan; CPCS argued intervention was appropriate because it "inevitably will be called on to provide (or already is providing) representation" to affected defendants. Id. at 481-482. "Intervention should be allowed as of right when '(1) the applicant claims an interest in the subject of the action, and (2) [the applicant] is situated so that [its] ability to protect this interest may be impaired as a practical matter by the disposition of the action, and (3) [the applicant's] interest is not adequately represented by the existing parties.'" Bridgeman, 471 Mass. at 484, quoting Massachusetts Fed'n of Teachers, AFT, AFL–CIO v. School Comm. of Chelsea, 409

[5] G.L. c. 211, § 3 (" . . . the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, . . . issu[ance of] such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration . . .).

Mass. 203, 205 (1991). The Court held that CPCS had "a substantial and immediate interest in these proceedings given its current and future responsibility for providing representation" to Dookhan defendants and because it "has been and will be asked to expend significant resources to handle countless numbers of these cases" Id. at 485-486. While there was "some overlap" in the matters raised by the existing parties and those raised by CPCS, the interests of CPCS went "well beyond" in light of its "position of having to provide representation to Dookhan defendants in eight counties" Id. at 486. The Court concluded, "it is appropriate that CPCS, which will be shouldering much of the burden for attempting to resolve the Hinton drug lab cases, be permitted to intervene in the present case." Id. at 487.

In their respective districts, the Four District Attorneys have similarly substantial interests in the outcome of the hearing on remand in this case. "The district attorney is the people's elected advocate for a broad spectrum of societal interests-from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection." Commonwealth v. Gordon, 410 Mass. 498, 500 (1991); G.L. c. 12, § 27 ("District attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge . . ."). The Four District Attorneys have within their districts a significant number of adjudicated first degree murder cases with defendants between the ages of eighteen to twenty-two at the time of their crimes[6] and cases in the pre-trial phase that would be affected.

And the potential impact reaches well beyond murder cases. Any expansion of Diatchenko I portends expansion of those rulings based on Diatchenko I. For example, in the wake of Miller and Diatchenko I, this Court in Commonwealth v. Perez, 477 Mass. 677, 688

[6] According to data obtained from the Department of Correction, the number of first degree murderers in this age cohort in the jurisdictions of the Four District Attorneys are: Cape and Islands 6; Essex 24; Norfolk 13; and Plymouth 49.

(2017)(Perez I), held that juveniles convicted of non-homicide offenses are entitled to individualized hearings prior to imposition of aggregate sentences with parole eligibility exceeding fifteen years. If this ruling is extended to those eighteen and above, countless settled sentences for a host of gravely serious non-homicide crimes could be affected. Id. (serial armed robberies and a near fatal shooting); Commonwealth v. Washington, 97 Mass. App. Ct. 595 (2020)(forcible child rape, unarmed robbery, and kidnapping); Commonwealth v. Lutskov, 480 Mass. 575 (2018)(armed home invasion). In the wake of any such major alteration in the law, the Four District Attorneys would "shoulder the burden" to deal with the fallout in their respective districts. They would expend substantial resources to re-litigate resentencing hearings and to appear at parole hearings as needed. In accordance with the Victim's Bill of Rights, it would be tasked through its victim witness staff with guiding and assisting victims and their families through the major unexpected disruption to their lives attending any such revision. G.L. c. 258B, § 3, 5.[7]

Though there is some overlap, the interests of the Four District Attorneys is not and cannot be adequately represented by the Suffolk District Attorney or any other single district attorney's office. Consistent with the position of the Suffolk District Attorney, all stakeholders should have a right to participate in such a substantial change. Moreover, Suffolk's support for legislation, as noted in its brief, suggests it may share Mattis' view of the brain science that underlay his broad request for relief -- a point on which there is likely to be respectful but significant disagreement by the Four District Attorneys. With their differing perspectives, it is

[7] "Advocates guide crime victims, their family members, and witnesses through the criminal justice process. They explain the process of a criminal prosecution; notify victims and witnesses of the scheduling of proceedings and the final disposition of a case; and provide information about the availability of . . . social services, including creditor and employer intercession services, where appropriate. G.L. c. 258B, §§ 3, 5. They help victims and witnesses 'cope with the realities of the criminal justice system and the disruption of personal affairs attending a criminal prosecution during a time of personal trauma.'" Commonwealth v. Bing Sial Liang, 434 Mass. 131, 134 (2001), citing Commonwealth v. Harris, 409 Mass. 461, 470 (1991), G.L. c. 258B, §§ 3, 5.

not only possible but likely that the Four District Attorneys would adduce different evidence, call different witness(es), and pose different questions at the evidentiary hearing. Their participation therefore could only assist in the creation of a fuller and more complete scientific record as is needed for this Court to consider such a momentous change in the law. Commonwealth v. Cruz, 445 Mass. 589, 598 (2005)(noting need for " appropriate and fully developed [scientific] record" on eyewitness identification).

The ability to weigh in as amicus curiae would not adequately protect their interests. Lacking party status, amici do not have any right to introduce evidence, to test evidence introduced, or to raise arguments beyond those raised by the parties. In re Harvard Pilgrim Health Care, Inc., 434 Mass. 51, 57 (2001)(amicus curiae are "heard only by the leave and for the assistance of the court"; "d[o] not engage in the adversary process"; and though "allowed to assist the appellate court by way of offering information and legal argument . . . such argument is limited to only those issues addressed by the parties."). Following the hearing, the factual record upon which these questions will be decided, presumably already subjected to adversarial testing, will already have been set. If the judge's findings are based in part on live testimony, and supported by whatever evidence is introduced, it will be accepted by this Court. Commonwealth v. Tremblay, 480 Mass. 645, 646 (2018)(affirming "the long-standing principle that an appellate court may independently review documentary evidence, but should accept subsidiary findings based partly or wholly on oral testimony, unless clearly erroneous."). The findings and this Court's opinion cannot take into account evidence not admitted below. Cruz, 445 Mass. at 598 (rejecting proffer of scientific studies not presented in trial court where "there was no hearing or testimony regarding the reliability of these studies or their general acceptance in the scientific community, and there is no basis on which this court may now assess their reliability."). Rather, in view of the Four District Attorneys' direct and substantial interests in the outcome and the potential far-ranging effects on the law of sentencing for years to come, participation as nonparty amici during or after the hearing would simply not be the meaningful participation fairness requires. In these circumstances, intervention should be permitted.

CONCLUSION

For these reasons, this Court should 1) vacate the remand without prejudice to action by the legislature or the filing of a declaratory judgment action; or, alternatively, 2) permit the Four District Attorneys to intervene and to participate, through their designee, in the evidentiary hearing ordered by this Court upon the remand in the above-captioned case.

RESPECTFULLY SUBMITTED,

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July 1, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this day of July 1, 2020, true copies of the MOTION OF FOUR DISTRICT ATTORNEYS TO VACATE THE REMAND WITHOUT PREJUDICE OR, IN THE ALTERANTIVE, TO INTERVENE in the case of:

Commonwealth v. Watt NO. SJC- 11693

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